IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELALTE JURISDICTION

SECOND APPEAL NO. 691 OF 1991
WITH
CIVIL APPLICATION NO. 1339 OF 2004

Bhau Bhiku Pawar ...Appellant
Vs
Bapu Manu Dhane
Since deceased by his heirs;

1.Smt. Kamal Bapu Dhane

2. Shri Madhukar Bapu Dhane

3. Shri Kumar Madhukar Dhane

4. Shri Shankar Manu Dhone
(Nos. 1 to 3 heirs of Original Defendant No.1 & Respondent No.4 Original Defendant No.2.)

Mr. B.P. Abhale for the appellant
Mr. R.A. Thorat for the respondents 1,2 and 4.

CORAM : ANOOP V.MOHTA J.
DATE : 16TH DECEMBER, 2005.

ORAL JUDGMENT

. This is a Second Appeal filed by the appellant-original plaintiff, as by the impugned judgment and decree dated 20th September, 1991, the Additional District Judge Satara has allowed the appeal filed by respondents 1 to 4, the legal heirs of original defendants, that resulted into the dismissal of the

appellant's (plaintiff) suit for specific performance. Therefore, this appeal.

2. On 16/12/1991, the present appeal was admitted on grounds 1 to 4 of memo of appeal as a substantial questions of law. Those grounds are reproduced as under;

"i. The learned Additional District Judge illegally and by adopting erroneous and defective procedure, arrived at wrong finding of facts to the effect that the transaction of registered agreement for sale dated 17th June, 1977 at Exh.71 was not an agreement to sale of the suit land but a money lending transaction.

ii. The substantial question of law is whether the interpretation of the learned lower Appellate Court regarding specific performance of contract contained in the various provisions of the Specific Relief Act and particularly in Chapter 2 thereof read in the light of the plaintiff's documents at Exhs. 71 and 72 and several other documents produced coupled with plaintiff's voluminous other documentary evidence and oral evidence is proper.

iii. The substantial question is whether the Defendant No.1, i.e. Bapu, who is held Manager of the Joint Family and competent to enter into transactions with the Plaintiff in para 26 of his Judgment and Bapu admittedly being in financial difficulties and executed other sale deeds was in fact and in law handicapped or incapacitated on account of his alleged blindness from entering into transactions of sale with the Plaintiff.

iv. The substantial question is whether the lower Appellate Court was justified in delivering the judgment on 20th September, 1991 in the appeal not withstanding the death of Bapu Manu Dhane and main contesting party-Appellant on 16th October, 1990 i.e. about 1 year prior to the said appeal decision and his heirs not being

brought on the record and therefore, appeal having abated and the Appellate Decree being a nullity.

3. Heard the learned Counsel appearing for the parties. The learned Counsel appearing for the appellant, has submitted to consider the civil application No. 1339/2004,for the additional evidence and material to be taken on record in this second appeal on the foundation that those facts are well within the knowledge of the respondents. The learned Counsel appearing for the respondents however, resisted the same.

4. The basic suit was for specific performance of contract filed by the appellant-plaintiffs is based on the transaction dated 17th June, 1977, Exh.71. Original defendants 1 and 2 Bapu and Shankar were the real brothers and the members of Hindu Joint Family. The property in question is an agricultural land, admeasuring 69 Gunthas of village Padali. Defendant No.1 was the Manager of Joint Family and looking after the welfare and the interest of the joint family of both the defendants. The original defendants had incurred financial liability and therefore, the joint family was required to pay the loan immediately in the year 1977,

as it was incurred by the son of Bapu Dhane, who was given in adoption. The original defendant was desired and intended to sell the suit land in the year 1977. They approached the plaintiff-appellant. A consideration of Rs. 6000/- was fixed.The original defendants received the amount of Rs. 3,200 in cash on the very day of negotiation, from the appellant. The parties agreed to execute the agreement for sale and to deliver the possession of the suit land to the plaintiff, as alleged. Original defendant No..2 Shankar required to go out of station, therefore, he asked defendant No.1, Bapu to execute the registered agreement for sale (Exh. 71) at Satara, on 17th June, 1977. As alleged, the plaintiff-appellant, paid the amount of Rs. 2300/- to Bapu before the Sub-Registrar. The possession of the property in question was handed over on the same day i.e. 17th June, 1977, by Bapu, defendant No.1. Since then the plaintiff is in possession of the suit property. Thereafter in spite of repeated demands made by the plaintiff/appellant, respondents failed to apply for requisite permission from the Revenue Authorities and further to execute the sale deed. As the oral request was not responded and as the appellant (plaintiff) was ready and wiling to perform his part of

the contract, by paying the balance amount of Rs.500/ to the original defendants, a legal notice dated 27th October, 1979, was issued. The said notice was not responded and or replied. Therefore, Reg. Civil Suit No. 4/1980 was filed for the specific performance.

5. The original defendants resisted the suit through their written statement. They denied the status of joint family. They further denied the transaction dated 17th June, 1977. They denied that they borrowed or obtained loan from a private person or from the bank and or they incurred any financial liability. They maintained that they never intended to sell the suit land to the appellant. They also denied all the promises and conditions of the transaction including of any legal necessity, as contended by the plaintiff. It was specifically submitted that Bapu Manu Dhane, original defendant No.1 was blind. He was not manager of the joint family. He was not authorised and or competent to dispose of the suit land. The possession was never handed over to the plaintiff-appellant. They had accepted some amount towards hand loan from the plaintiff-appellant, therefore, asked for the refund of the said amount. In this background, it was contended

that by taking advantage of the blindness of Bapu, defendant no.1 and playing fraud, got the thumb impression on the agreement in question. Therefore, the contention was raised, that the said agreement for sale Exh.71 got executed by playing fraud and by taking advantage of the blindness. It was further contended that even as per the document, the sale ought to have been executed within 6 months from the date of the agreement for sale. The plaintiff-appellant did not executed the sale deed in stipulated time, therefore, at the most, he was entitled for the earnest money. They further contended that the transaction was never agreement for sale. It was the transaction in relation to the amount advanced by the plaintiff to the original defendant from time to time. therefore, the suit for specific performance was resisted.

6. The trial Court framed the issues and after taking into consideration the material placed on record through the respective witnesses, granted decree in suit for specific performance, as prayed and it was further directed that on failure of the original defendant to perform the obligation,the plaintiff was at liberty to get sale deed completed through the Court. The

possession of the property in question was declared in favour of the appellant-plaintiff and further observed that on execution of the sale deed the said possession becomes possession by the ownership. As the appeal period was expired, the original plaintiff-appellant filed execution proceeding R.D.No. 194/1980 and the decree for specific performance was accordingly executed.

7. The original-defendant therefore, preferred the appeal before the Additional District, Judge, Satara, after six months from the date of trial Court's decree on 21/8/1986. There was no stay of execution of the decree. on 15/5/1987 in the execution proceeding, notices were also issued to the defendants by the Court Commissioner, who applied for the permission from the resettlement officer, as per the provisions of Resettlement of Project Affected Persons Act, 1979. However, it was found that no permission was necessary from the Consolidation Officer under the fragmentation Act, 1947, as land being a whole gat number and not fragmented. Therefore, final sale deed was executed on 15/5/1987 in favour of the plaintiff. On 6/4/1990 the appellant dug up a Well in the suit land, after

obtaining final sale deed and by raising loan of Rs. 30,000/- from the Bank of Maharashtra and installed electric connection and developed a farm-house and made vast developments and improvements on the land. On 10/11/1990, original defendant No.1, Bapu Dhane died during the pendancy of the appeal No. 456/1986. Therefore, till the date of the order passed by the appellate Court on 20/9/1991, the heirs of original defendant No. 1 were not brought on the record.

8 . The appellate Court framed the issues/points and held that appellant/plaintiff failed to prove that defendants/respondents intended and desired to sell the suit land for legal necessity of the joint family; the appellant failed to prove that original defendant No.1 Bapu Manu Dhane, executed the agreement for sale on 17/6/1977; plaintiff failed to prove that possession of the suit land was delivered to him as part performance of the agreement for sale. The appellate Court further held that the original defendants/respondents proved that the documents executed on 17th June,1977, by practicing fraud on Bapu Manu Dhane, original defendant No.1, by taking advantage of his blindness obtained the thumb-impression in lieu of the amount obtained from

time to time, as private loans and further that the transaction in question was not in the form of agreement for sale. Based on this, the appellate Court has interfered with the impugned judgment and decree dated 12/3/1986 passed by the 3rd Jt. Civil Judge, J.D., Satara and set aside the same and the suit was dismissed. However, it was ordered that the appellant-plaintiff is entitled to recover the amount of earnest money of Rs. 5,500/- with interest at the rate of 6% per annum on the decretal amount for the period from the date of institution of the suit till the date of realisation of the same. The appellate Court accordingly allowed the appeal.

9. The decision to grant the specific performance has a foundation of a discretion of the Court, which has to be exercised on sound and well settled principle of law and not arbitrarily. It is equally settled that in the case of contracts for sale of immovable properties, the grant of relief of specific performance is a rule and the refusal is an exception only on valid and cogent grounds. The parties cannot take advantage of their own wrongs. The plaintiff, if ready and willing to perform his part of contract and proved accordingly, is entitled

to the decree for specific performance. **(Ajit Prashad Jain V. N.K. Widhani and others) (AIR 1990 Delhi 42)** It is settled that there is no bar to the Court to pass a decree of specific performance even though certain permissions under the Special Acts are required. Such permission, if any, although required, would be a matter for consideration, after passing decree and at the stage of execution. Such permission cannot be a condition precedent for passing a decree for specific performance of contract. **(Mrs. Chandnee Widya Vati Madden V. Dr. C.L. Katial) (1964 2 SCR 495 and Maharao Saheb Shri Bhim Singhji V. Union of India (AIR 1981 S.C. 234).** The Apex Court in **(Prakash Chandra V. Angadlal and others) (AIR 1979 SC. 1241)** based on section 21 of Specific Relief Act, 1963, has observed that "the ordinary rule is that the specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief." The Apex Court further observed in **(K.S. Vaidyanandam and others V. Vairavan) (1997 S.C. 1751)** while considering the provisions of section 21 of Specific Relief Act, observed that in case of rise in prices of the properties coupled with delay, it would be

in equitable to give relief of specific performance.

10. Admittedly, the trial Court, by an order dated 12/3/1986 granted the decree for specific performance and passed and ordered defendants 1 and 2 to execute the sale deed of the suit lands in favour of the plaintiffs and passed such other orders. The trial Court has considered the material and evidence on record and held that there was legal necessity for the joint family and therefore, the defendants were intended to sale the suit property. The transaction in question dated 17/6/1977, was an agreement to sale. There is no further dispute that the plaintiffs has been in possession, since 17/6/1977 i.e. from the date of agreement in question (Exh.1), The plaintiffs are in possession based on document Exh.71 and 72. After going through these documents, it is clear that the possession was not handed over at the relevant time, while executing the agreement to sale. But there is no dispute that the possession of the property has been handed over by the defendants on the same day i.e. 17/6/1977 through Exh.72. Therefore, since the date of suit the plaintiffs have been in possession of the property. As there was no stay in operation, even though

respondents/original defendants 1 and 2 preferred the appeal. Therefore, the decree for specific performance was duly executed and the original defendants executed the sale deed based on the agreement in question in favour of one Yeshwant Shelar Exh.73 and 74.

11. It was argued by the learned Counsel appearing for the respondents that Exh.71 dated 17/6/1977 was never intended to be an agreement for sale and that it was a loan transaction. There was no dispute in this matter that based on the said agreement, the defendants had accepted earnest money of Rs. 5500/- and it was later on registered. The balance consideration of Rs. 500 was only left. The same was also deposited. The judgment and decree passed by the trial Court has been executed, as a registered sale deed. There is evidence on the record that the said agreement was registered before the Sub-Registrar and the balance amount of Rs. 2000/- was accepted by Bapu Dhane, in his presence. The endorsement and the certificate issued by the Sub-Registrar are further proved that the document executed in presence of the competent authority and it was registered accordingly. There is a further material on the record that said document in question was

executed in the office of Sub-Registerar. The allegation was made about fraud and misrepresentation by the plaintiff against the defendant, of taking advantage of his alleged blindness and obtained the thumb impression on the said document. Such allegation of fraud and or misrepresentation, in absence of positive evidence, difficult to accept. The receipt of initial amount, as well as, amount received before the Sub-Registrar proved that defendant No.1 was in sound mind and executed the said agreement for sale. It is difficult to accept the case of the defendants that the plaintiffs have played fraud on defendant no.1 and obtained his thumb impression in the guise of an acknowledgement of liability, to repay the loan borrowed from the plaintiff. The endorsement of the Sub-Registrar, being the public servant and the registration of the document and the registration certificate, in the facts and circumstances, need to be accepted against the bare words of defendant No.1, specially when original defendant No.1 failed to explain the circumstances of putting his thumb-impression at page 4 below the endorsement of certificate of the Sub Registrar. The documents in question as observed by the trial Court, have 4 thumb impression of defendant No.1.

In this background, the evidence of defendant No.1 and of his mother cannot be said to be cogent, satisfactory and reliable to establish the alleged fraud or misrepresentation.

12. The facet of acceptance of first instalment of Rs. 3200/- prior to 8 days of execution of the registered agreement for sale in question is also relevant. The second instalment was received on the date of registration of document. No witnesses even though examined by the defendants, have supported the case of the defendants of money lending transaction. The cumulative effect of all this certainly concluded that the agreement in question was agreement for sale and it was rightly decreed and executed by the parties. There is no doubt that on the agreement for sale there was no endorsement about the possession of the property in question. But there is no dispute that the document Exh.72 on same date endorsed the factum of possession in favour of the plaintiff. Admittedly, the plaintiff has been in possession since the date of agreement for sale. Merely because there is a separate document of possession of the same day Exh.72, that itself cannot be the reason to overlook the agreement for sale Exh.71 in

question. There is an ample material on record to suggest that the plaintiffs have been in possession, since the date of Exh.71 and 72. The adjoining land holders have corroborated the fact of possession, from the date of agreement in question. This is also an additional facet in support of the plaintiff and against the defendants that there was no fraud committed while taking the possession of the property in question, based on the agreement for sale Exh.71.

13. There is an ample material on record that some time in the year 1971 and 1974 defendant No.1, though blind had executed two documents of sale deeds in favour of Yashwant Shelar in respect of the house and other lands. Defendant No.2 never disputed the quantity of, disposing of the said property, only by defendant No.1. There is a material also on the record, through the evidence of plaintiff that at the time of negotiations he paid Rs. 1200/- to defendant No.1 in presence of defendant No.2 and defendant NO.2 had consented to complet of the transaction. In this background, it cannot be said that defendant No.2 had not consented for the suit transaction.

14. There was evidence on the record to show that defendant No.1 had received loan amount of Rs. 2840/- from Satara Zilla Land Development Bank on 10th November 1070. There was no material brought on the record that in the year 1977 the defendants had repaid the loan amount to the bank and or they were not indebted. The document Exh.71 clearly shows the intention of defendant No.1 to sell the land, for the reason that they were in need of money. The Appellate Court further observed that the said loan, which was taken in the year 1970, was satisfied in the year 1984. It is further observed that both the brothers had obtained loan on 3rd June 1970, 10th June, 1970 of Rs. 3150/- for the construction of Well. Therefore, the financial condition of the defendants were definitely not sound at the relevant time. The Appellate Court however, reversed the finding on the ground of failure on the part of purchaser to discharge the burden that there was a legal necessity. However, considering the material and evidence on the record, I am of the view, that the reasoning given by the trial Court is correct. There was legal necessity and therefore, defendant No.1 executed the agreement for sale.

15. There was no material to show that there was severance of joint family or there was partition in respect of the property in question between the defendants. The defendant No.1 being Manager of the Joint Family was competent to enter into the transaction.

16. The Appellate Court was wrong in reversing the decree for specific performance by observing that defendant No.1 was suffering from blindness and that the possession of the suit land was not delivered to the plaintiff as part performance of the agreement for sale. The appellate Court has expressed suspicion and doubt about the nature of the transaction. However, considering the circumstances on the record, including the receipt of the money as agreed of Rs. 5500/- by the original defendants and thereafter execution of the sale deed on 17/6/1977 in presence of Sub-Registrar, Satara and endorsement by the Sub-Registrar on the said documents supports the case of the plaintiff that the document in question Exh.71 was agreement for sale and the parties therefore had acted accordingly.

17. The Appellate court was wrong in observing that

defendant No..2 was kept completely in the dark about the transaction, specially when there was material to justify that first instalment was paid and as observed by the trial Court, in presence of defendant No.2 and both the brothers have consented for the transaction to proceed further. Merely because Sevantabai the mother of the defendants, expressed surprise to this transaction,that itself cannot be the reason to overlook the registered agreement for sale in question. The said agreement in question even though not worded properly but parties having accepted the transaction and further endorsed by the Sub-Registrar, I see there is no reason to overlook the intention of the parties and the effect of registration of the said document. The appellate Court has not accepted the case of total blindness of defendant No.1 but accepted partial blindness. It was also observed that some one must had accompanied him at the time of execution of the document Exh. 71 and 72. Defendant No.1, as referred above executed the sale deed dated 26/4/1971 in favour of Yashwant Shelar on 26/6/1971 and 29th March 1972. Therefore, in this background, the appellate Court was wrong by reversing the findings given by the trial Court of granting specific performance in favour of the plaintiff. The

partial blindness in no way affected the other transactions entered by defendant No.1 from time to time. In this background, it cannot be said that the defendants were not aware of the nature of the transactions and or documents, when it was executed and specially in the presence of the Sub-Registrar at Satara. The trial Court, therefore, was right by observing that the document in question was executed by defendant No.1 in sound mind and knowing fully its contents. Defendant No.1 therefore, on behalf of defendant No.2 had accepted the money even in presence of Sub-Registrar as observed above, while registering the document. In view of this,, I am of the view, that the judgment and decree and reasoning given by the trial Judge is correct. The reversal judgment and decree passed by the Appellate Court dated 20/9/1991, therefore, need to be quashed and set aside.

18. In view of the legal background as referred above, and facts and circumstances of the case, I am inclined to exercise the discretionary power in favour of the plaintiff, in view of the reasoning given by the trial Court. The additional facet of execution of sale deed based on the agreement also supports that the

plaintiff is entitled for the specific performance of agreement for sale. The original plaintiff-appellant is therefore, right in challenging the reversal findings given by the appellate Court. According to me the said finding given by the appellate Court in the background of legal provisions, as referred above is not correct. Therefore, I am inclined to interfere with the same.

19. The facet of "another possible view" the appellate Court should not interfere with the finding, as laid down in Apex Court's decision in **Veerayee Ammal V. Seeni Ammal) (2002) 1 Supreme Court Cases 134** is not applicable in the present case. In the facts and circumstances, I am of the view that the findings given by the trial Court was not perverse and ought not have been interfered by the Appellate Court. The Apex Court as laid down in **(Radhanath V/s Haripall) AIR 1971 S.C. 1049,** that the High Court can interfere in Second Appeal, if first appellate Court failed to consider the material evidence in shape of documents and making good deal of assumptions of fact. In the present facts and circumstances, a case is made out to interfere with the findings given by the appellate Court. The Supreme Court has observed that in second Appeal, even if there

is a concurrent findings of facts, but based on non consideration of relevant evidence and or approached wrongly, the High Court cannot precluded from recording proper findings. In **(Ramlal & Another V. Phagua & others) 2005 AIR SCW 6348,** Para 18, the Apex Court has observed that the High Court is at liberty to re-appreciate the evidence and record its own conclusion for reversing the orders passed by the lower Court, as Courts blow not appreciated the oral and documentary evidence properly and correctly.

20. So far as fact of an abatement, admittedly, defendant No.1 expired pending the appeal, one year before the decision of the appeal. No steps were taken for bringing on record the heirs of defendant No.1 Bapu. However, in view of the above reasoning that its joint property and cause of action still survive as other defendants who were represented, I see there is no reason to consider the case of fact of abatement in the present case now, specially when defendant No.1 himself at the relevant time through the Court, executed the sale deed based on the agreement in question.

21. In this background I answered the substantial

questions of law as under;

. The agreement of sale dated 17/6/1977 Exh.71 was not a money lending transaction and it was agreement for sale.

22. The interpretation by the Appellate Court in respect of the document Exh.71 and 72 was wrong. Defendant No.1 Bapu, Manager of Joint Hindu Family was competent to enter into the transaction and accordingly executed the document, being in financial difficulties. He was competent and sound mind, while entering into the transaction for sale in question with the plaintiff. As he was partially blind, the appellate Court, therefore, wrong in reversing the judgment and decree passed by the trial Court dated 20th September, 1991.

23. The death of Bapu Manu Dhane, as observed therefore, no way affect the suit for specific performance, as decreed by the trial Court. The property being joint property, the death of Bapu defendant No.1 no way affects or abate the appeal, as right to sue continue.

24. Taking above all into account, there is no reason now to entertain the civil application filed by the appellant for taking additional material or facts on record. Therefore, in the above reasoning itself, the civil application is disposed of, as rejected.

25. In this background, specially, admittedly, based on Exh.71 and 72, the plaintiffs have been in possession of the property since 1977, as there was no stay of execution, as defendants failed to obtain the stay for whatever may be the reason. Through the Court sale deed was executed. The notice was also issued to the Commissioner, whereby it was observed that no permission was necessary of any kind under any special law. Therefore, as per the agreement for sale in question, through the Court, sale deed was executed. In view of this, there is no reason now to interfere with the reasoning, as well as, findings given by the trial Court. The plaintiff is entitled for specific performance, as prayed. The trial Court’s judgment and decree therefore, is maintained and the Appellate Court’s judgment and decree dated 20/9/1991 is quashed and set aside. The suit for specific performance, as prayed is decreed.

. Appeal is allowed.

. The plaintiff/appellant is entitled for specific performance, as prayed. The Judgment and decree passed by the Trial Court is maintained and Judgment and decree passed by the Appellate Court is quashed and set aside.

. Civil Application is disposed of as rejected.

(ANOOP V. MOHTA, J.)